No. 93-468

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

ROBERT D. GUNTER JR.,

Petitioner

v.

STATE OF ARKANSAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE TRIAL COURT VIOLATE THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN ALLOWING A RAPE VICTIM AND HER DOCTOR TO TESTIFY CONCERNING HER MEDICAL AND PSYCHOLOGICAL HEALTH WITHOUT FIRST SUPPLYING HER MEDICAL AND PSYCHOLOGICAL RECORDS TO THE DEFENDANT UPON PROPER MOTIONS BEFORE AND DURING THE TRIAL, THEREBY DENYING THE PETITIONER HIS CONSTITUTIONAL RIGHT TO CONFRONT HIS ACCUSERS?

TABLE OF CONTENTS

	Page
Question Presented for Review	1
Table of Authorities	3
Opinion Below	5
Statement of Jurisdiction	5
Constitutional Provisions	5
Statement of the Case	6
Reasons for Granting the Writ	9
Conclusion	15
Appendix	

TABLE OF AUTHORITIES

Page

United States Supreme Court Cases

Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) 10
Napu v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) 10
Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) 8, 10, 11, 15
Poynter v. Texas, 380 U.S. 400, 403-406, 85 S.Ct. 1065, 1067, 1069, 13 L.Ed.2d 923 (1965) 10
United States v. Abel, 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984) 10
United States v. India, 47 U.S. 396, 106 S.Ct. 1126 11
Washington v. Texas, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 1922-1923, 18 L.Ed.2d 1019 (1967) 10

Arkansas Cases

Davasher v. State, 308 Ark. 154, 823 S.W.2d 863 (1992) 14
Gunter v. State, 313 Ark. 504, ___ S.W.2d ___ (1993) 5, 8
Kelly v. State, 7 Ark. App. 130, 644 S.W.2d 638 (1983) 13
McVay v. State, 312 Ark. 73, 847 S.W.2d 28 (1993) 14

Constitutional Provisions

United States Constitution
Sixth Amendment 5, 9, 10, 11
14th Amendment 6, 10

Statutes and Rules

Arkansas Code Annotated §5-14-103 6
Arkansas Code Annotated §16-44-201 13
Arkansas Code Annotated §16-44-202 13
Arkansas Rules of Criminal Procedure, Rule 17 9
Arkansas Rules of Evidence, Rule 503(b) 13
Arkansas Rules of Evidence, Rule 503(d)(3) 14

OPINION BELOW

This case was initially docketed as Arkansas Supreme Court Case No. CR 92-1222 and is cited as *Gunter v. State*, 313 Ark. 504, ___ S.W.2d ___ (1993).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is brought to review the decision of the Supreme Court of Arkansas on June 21, 1993 in Case No. CR 92-1222, Robert D. Gunter Jr. v. State of Arkansas, cited as *Gunter v. State*, 313 Ark. 504, ___ S.W.2d ___ (1993). The petitioner believes that this Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment 14, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was convicted of the offense of rape, a Class Y felony, in violation of Ark. Code Ann. §5-14-103 on June 9, 1992. The petitioner had previously been tried on January 27, 1992, and that trial ended in a hung jury.

The victim, Verna Shaker, testified that she and a friend ate dinner and had two drinks at a restaurant and then went to a nightclub to have a drink. There they met two men, one being the petitioner, and after the nightclub closed down, he drove the victim and her friend to Cranfield Road and let the friend out. The petitioner and the victim then traveled to the Cranfield Boat Ramp of Norfork Lake and talked for a few minutes and then moved the van they were driving to the campsites behind the Cranfield Boat Dock. The victim stated at this point the petitioner became very abusive and would not take "no"

for an answer. The parties agree that sexual intercourse occurred at that point, and the petitioner alleged it was consensual, and the victim stated he pushed her back to the back seat and had oral sex and then intercourse with her. The victim then told the petitioner that her daughter was at home and she needed to get home to take her medication and then she drove into town without wearing her pants and, after dropping the petitioner off at the nightclub, drove to the Mountain Home city police and made a complaint. After interviewing witnesses, a warrant was issued for the petitioner, and he was found hiding in a closet at the home of his ex-wife.

At trial, the petitioner contended that the sexual intercourse was consensual, and the trial court erred in not allowing him to inspect the psychological and medical records of the victim, even though he had made requests prior to trial and again during the trial. It is from the denial of those requests that this petition is filed. Specifically, the defendant filed a motion for psychological and/or medical records on September 30, 1991, and this motion was denied at a pretrial hearing prior to the first trial. The first trial ended in a hung jury, and at the second trial, the request was again denied. The transcript of the objection appears on pp. A-19-22 of the Appendix.

The next issue involving a constitutional question is where the state asked on direct examination:

> **The Prosecutor:** In addition to the physical injuries, what was the status of your emotional health following this incident?

> **Mr. Carter:** Your Honor, I am going to object. I don't think this is relevant, and if it is, I have specifically requested certain records in order to cross-examine. I did file a motion on that. I think the court ruled on it once, and I renew that motion.
>
> **The Court:** The objection will be overruled.
>
> **The Prosecutor:** How is your emotional situation following this attack?
>
> **Victim:** I was sent to Missouri. I have been seeing a psychiatrist.

Both these issues were appealed to the Supreme Court of the State of Arkansas and ruled on in *Gunter v. State*, 313 Ark. 504, ___ S.W.2d ___ (1993). The Arkansas Supreme Court indicated the petitioner could have taken the medical doctor's deposition, that the request for psychological records was not renewed prior to the second trial and that the petitioner invited some of the questions which he now claims are error, and it affirmed the trial court's ruling and the petitioner's conviction.

This petition asks this Court to consider this question pursuant to Rule 10(c) of the Rules of the Supreme Court in that the Supreme Court of the State of Arkansas has decided an important question of federal law which has not been fully, but should be, settled by this Court and should further expand and clarify the Court's holding in *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

REASONS FOR GRANTING THE WRIT

In its most basic sense, the petitioner requests this honorable Court to grant this petition for writ of certiorari because the defendant was denied his Sixth Amendment right to confrontation and effective cross-examination. Pursuant to the Arkansas Rules of Criminal Procedure, the defendant requested that the state comply with those rules and further requested that the state provide the defendant the victim's medical and psychological records. These requests were denied by the court at an earlier trial (see Appendix p. A-21) and again at the trial of this matter, despite the fact that, pursuant to Rule 17 of the Arkansas Rules of Criminal Procedure, the state listed Robert L. Kerr, the victim's physician, as a witness. (See Appendix p. A-28). In addition, the state elicited testimony from the victim that she had had psychological problems concerning this matter and was seeing a psychiatrist (see Appendix p. A-22) and finally the defendant was able to elicit testimony on the stand from the victim that she was disabled and was receiving social security disability payment in part because of short-term memory loss (see Appendix p. A-24).

At no time prior to trial nor during the trial were the records supplied to the petitioner, despite his request for them and a written motion and objections of pretrial hearing, a former trial and at the trial in which he was convicted. The defendant was convicted of rape and sentenced to 40 years. The issue at trial was not one of sexual intercourse, but of consent. These facts distinguish this

case from *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), which is a case that closely resembles this matter. The key difference is that, in this matter, the defendant was not going on a "fishing expedition" but one in which he needed the victim's medical records because he knew the victim's physician was going to be called to testify, that the victim was going to testify to the psychological effects on her and that the victim suffered from short-term memory loss. To deny the petitioner access to these records was to deny his right to effective cross-examination.

The Sixth Amendment of the United States Constitution protects both the right of confrontation and the right of compulsory process. Both clauses are made obligatory on the states by the Fourteenth Amendment. *Poynter v. Texas*, 380 U.S. 400, 403-406, 85 S.Ct. 1065, 1067, 1069, 13 L.Ed.2d 923 (1965); *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 1922-1923, 18 L.Ed.2d 1019 (1967). The Court in *Ritchie, supra*, stated:

> Of course, the right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable. *United States v. Abel*, 469 U.S. 45, 50, 105 S.Ct. 465, 468, 83 L.Ed.2d 450 (1984); *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). Because this type of evidence can make the difference between conviction and acquittal, *see, Napu v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959), Ritchie argues that

> the failure to disclose information that might have made cross-examination more effective undermines the Confrontation Clause's purpose of increasing the accuracy of the truth-finding process at trial. *See, United States v. India, supra*, 475 U. S. at 396, 106 S.Ct. at 1126.

Ritchie argued to the Court that "he could not effectively question his daughter because without the CYS material, he did not know which types of questions would best expose the weakness in her testimony. Had the files been disclosed, Ritchie argued that he might have been able to show the daughter made statements to the CYS Council which were inconsistent with her trial statements, or perhaps to reveal that the girl acted with improper motive." *Ritchie* at 51. In essence, Ritchie was making a guess at what the material would show. In the petitioner's case, he had an idea what the material would show but did not have the material at hand to conduct an effective cross-examination. With regard to this issue, the Arkansas Supreme Court made the following findings and rulings:

> Here, the trial court merely denied Gunter's objection to the introduction of medical testimony offered by the state in the testimony of Dr. Robert Kerr, which in no way implicates Gunter's Sixth Amendment right of confrontation. Dr. Kerr's name was on the witness list and, from the previous trial, Gunter was aware of the nature of Dr. Kerr's testimony. Gunter could have deposed the doctor before trial. He could have had a doctor examine Dr. Kerr's responses and testify at trial regarding the

> prosecutrix's medical condition. Gunter was also free to cross-examine the prosecutrix and Dr. Kerr at trial.
>
> Additionally, while Gunter moved to compel discovery of the prosecutrix's medical and psychological records prior to the first trial, we find no indication that that motion was renewed prior to the second trial. During the second trial, counsel for appellant referred to the motion in connection with his objection to a question to Dr. Kerr concerning the prosecutrix's physical strength and capacity to resist an assault. In the course of that objection, counsel renewed the motion to discover such records, but that came near the end of the state's case, and certainly it was not incumbent on the trial court to consider a pretrial discovery motion at that late stage in the proceedings.
>
> Finally, appellant has made no showing as to how the prosecutrix's medical and psychological records would be relevant in determining whether she was forcibly raped.

The petitioner disagrees with the Supreme Court of Arkansas in that he raised the issue and the trial court knew that was always an issue (see Appendix pp. A-21-22). The Supreme Court of Arkansas also pointed out that the petitioner could have taken the doctor's deposition. That is not true under Arkansas law, and there is no holding or statute that allows depositions in a criminal case. Arkansas law has no provision whatsoever allowing interrogatories or depositions in a criminal case except

under Ark. Code Ann. §§16-44-201 and 16-44-202. It is clear that a deposition is allowed only in a criminal case:

> Where there are reasonable grounds to apprehend that, before trial, the witness will die, will become mentally incapable of giving testimony or physically incapable of attending the trial, or will become a non-resident of the state. The materiality of the testimony and the reason for taking the deposition shall be shown by affidavit.

Arkansas law does not allow the taking of a deposition, and by inference interrogatories, in a criminal case where a doctor, or any person, intends to testify. In *Kelly v. State*, 7 Ark. App. 130, 644 S.W.2d 638 (1983), the Arkansas Court of Appeals held there was no statutory authority for requiring a corporate official to appear in a pretrial deposition with work and pay records of employee witnesses. The court went on to state that the right to take a deposition rests upon statutory authority and cannot be exercised unless that authority exists.

The appellee's argument that the appellant was free to cross-examine the victim and Dr. Kerr at length has no merit if he does not have the medical records from which to cross-examine the witness. The state argued under Rule 503(b) that the records were privileged. The petitioner agrees that the records were privileged, but it was the state, not the appellant, who placed the victim's physical condition at issue by listing her family physician as a witness. The victim put her physical condition into issue by alleging that, because of osteoporosis and a heart

condition, she was weakened. This was confirmed by her family physician, Dr. Robert Kerr, who also discussed other problems and medicines that the victim had. Under the Arkansas Rules of Evidence, specifically Rule 503(d)(3), there is a waiver of the physician-patient privilege if the patient relies upon a physical, mental or emotional condition as an element of his claim of defense. *McVay v. State*, 312 Ark. 73, 847 S.W.2d 28 (1993); *Davasher v. State*, 308 Ark. 154, 823 S.W.2d 863 (1992). In this matter, the victim's physical condition became an issue raised by the state and the victim, even more so when the state called her family doctor to elaborate on the conditions that the victim allegedly suffered.

The Supreme Court of Arkansas also indicated that "an appellant cannot base a claim of reversible error upon testimony which he himself chose to introduce" with regard to the social security benefits. Petitioner would point out that, when he has been denied access to medical records to which a victim and her doctor have testified, he has to use whatever "hit-and-miss" tactics at his disposal in order to discredit the witness. The fact that a person claiming rape has a short-term memory loss is very significant when the issue is one of consent, and therefore these records were vital to the petitioner's defense.

CONCLUSION

For the foregoing reasons, the petitioner requests this Court to grant his petition for writ of certiorari and find on the facts that this case is distinguishable from *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), and set a briefing schedule for this matter to be argued to this honorable Court.

Respectfully submitted,

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APPENDIX

Page

Opinion of the Arkansas Supreme Court, Case CR 92-1222 ..... A-2

Judgment and Commitment Order (Tr. 67) A-15

Court's Ruling on Rape Shield Statute (Tr. 83-85) A-16

Defendant's Objection to Court Ruling on Confrontation Clause Concerning Medical Records (Tr. 247-250) A-19

Victim's Testimony Concerning Mental Health and Defendant's Objection (Tr. 141) A-22

Victim's Testimony Concerning Short-Memory Loss (Tr. 152-153) A-24

Defendant's Motion for Psychological and/or Medical Records, Filed September 30, 1991 (Tr. 22-25) A-27

State's Rule 17 Disclosure to Defendant (Tr. 26-28) A-29

Defendant's Motion for Ruling on Admissibility of Evidence (Tr. 44-48) A-32

Remaining Portions of Dr. Kerr's Testimony (Tr. 242-246, 251-253) A-35

OPINION OF THE SUPREME COURT OF ARKANSAS

SUPREME COURT OF ARKANSAS
No. CR 92-1222

Robert D. Gunter Jr., Appellant

v.

State of Arkansas, Appellee,

Opinion Delivered June 21, 1993

Appeal from the Baxter County Circuit Court
No. CR 91-106
Hon. Robert W. McCorkindale II, Judge
Affirmed.

Steele Hays, *Associate Justice:*

Robert D. Gunter Jr. appeals from his conviction for rape. Gunter testified on his own behalf, admitting that sexual intercourse occurred but maintaining that it was consensual. In Gunter's first trial the jury was unable to agree on a verdict. On retrial, the jury returned a verdict of guilty and sentenced Gunter to a term of forty years in the Department of Correction. None of the six errors ascribed to the trial court are persuasive and, accordingly, we affirm the judgment entered on the conviction.

On June 6, 1991, the prosecutrix and Judy Smyser met for dinner at the Watertree Inn outside of Mountain

Home. They knew the waiter, Matthew Bennett, who also worked as a bartender at the Red Fox, a private club at the Holiday Inn. Bennett invited the two women to come there later, which they did.

The events of that evening are partially disputed. The testimony established that when the prosecutrix returned to her seat after dancing, Robert Gunter, the appellant, was sitting in her seat. Apparently, the prosecutrix, Ms. Smyser, Mr. Gunter, and a friend of Gunter's, were sitting at the same table. There is disagreement over the amount of contact Gunter and the prosecutrix had with each other and whether they danced and drank together.

At approximately 1:00 a.m. the bar was closing and the prosecutrix was looking for her car keys. Although Gunter denied it, witnesses testified that he stood by the door and jingled the car keys, which he evidently obtained from her purse while she was dancing. They then walked out to the prosecutrix's van and got into the van with Gunter in the driver's seat. The women testified that they were under the impression that Gunter was going to drive Ms. Smyser to her car and get some cigarettes and then the prosecutrix would drop him off at his house or at the Red Fox. After dropping Ms. Smyser off, and getting cigarettes, Gunter drove down Cranfield Road and went to the Cranfield campgrounds. The prosecutrix testified that at this point Gunter became violent and would not take "no" for an answer. The parties agree that sexual intercourse occurred. However, Gunter insists it was consen-

sual and the prosecutrix contends he pushed her to the back seat and forcibly had oral sex and intercourse with her.

The prosecutrix dropped Gunter off at the Red Fox and drove directly to the Mountain Home Police Department.

Officer Tommy Steen met Deputy Kenneth Grayham and the prosecutrix at the Baxter County Regional Hospital where she answered questions and was examined. Deputy Grayham, Dr. Robert Kerr, the prosecutrix's doctor, and Danette Grayham, a jailer/dispatcher with the sheriff's department who took pictures of the victim, all testified that she was bruised in several places and had a scratch with a bruise around it on her upper arm. Blood was also discovered on the back seat of the van where intercourse admittedly occurred. A warrant was issued for the arrest of Robert Gunter. When the warrant was executed he was found hiding in a closet at the home of his former wife.

I.

We first address the argument that the verdict was contrary to the substantial weight of the evidence.

After the state's case, and again at the close, Gunter moved for a dismissal of the charges on the basis that the state failed to meet its burden of proof. The trial court stated that it found the victim's testimony convinc-

ing and denied the motion.

On appeal, before considering other assignments of error we determine the sufficiency of evidence, including any proof which should not have been admitted. *Scroggins v. State*, 312 Ark. 106, ___ S.W.2d ___ (1993). A motion for directed verdict is a challenge to the sufficiency of the evidence. *Glick v. State*, 275 Ark. 34, 627 S.W.2d 14 (1982). The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, whether direct or circumstantial. *Thomas v. State*, 312 Ark. 158, ___ S.W.2d ___ (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

In rape cases, the requirement of substantial evidence is satisfied by the rape victim's testimony. *Bishop v. State*, 310 Ark. 479, 839 S.W.2d 6 (1992). We have held that the testimony of the victim which shows penetration is enough for conviction, and such testimony need not be corroborated to be sufficient. *Davis v. State*, 308 Ark. 481, 825 S.W.2d 584 (1992).

The testimony of the prosecutrix alone provides substantial evidence to support the conviction. She elaborated on the events at the Red Fox, where Gunter and his

friend began sitting at their table. At closing time she was unable to find her car keys, but after a few minutes, Gunter, who was standing by the door, held up her keys and jingled them. The prosecutrix, Ms. Smyser, Mr. Gunter and Gunter's friend walked out to the prosecutrix's van. The friend left but Gunter insisted on getting into the van with the two women.

The prosecutrix testified that she was under the impression that Gunter was going to take her to get cigarette and come back to the Red Fox, but after they dropped Ms. Smyser off and got the cigarettes, he drove to the Cranfield campgrounds. She told Gunter that she needed to go home and check on her daughter and take her medicine but he threw her in the back of the van, got on top of her and held her down with one arm while he took her pants and underwear off with the other. she stated she begged him to stop and not to hurt her. She testified that the appellant then forced her to have oral sex with him, attempted to have anal sex but was unable to complete the act, and then had vaginal sex. She stated that none of these acts were done with her consent.

Deputy Grayham, Dr. Robert Kerr, the prosecutrix's doctor, and Danette Grayham, a jailer/dispatcher with the Baxter County Sheriff's Department, all described bruises on the arm, back, inner thigh and legs of the prosecutrix. There was also blood on the seat in the back of the van which would be consistent with the bleeding from a cut which was described as being on the arm of the prosecutrix.

There were minor conflicts in the testimony of some of the witnesses, but where witness credibility is involved, wide discretion is given to the fact-finder which has the opportunity to observe the witnesses. *See Hollaman v. State*, 312 Ark. 48, ___ S.W.2d ___ (1993); *Lowe v. State*, 309 Ark. 463, 830 S.W.2d 864 (1992). Therefore, the evidence was sufficient to support the jury's verdict.

II.

Gunter argues the trial court erred in failing to grant his request to examine the victim's medical records relating to her osteoporosis and mitral valve prolapse conditions. He claims that because Gunter intended to testify in his own behalf and to call her physician to testify concerning her alleged weakened condition, her ability to bruise easily, and the medication she was taking, he is entitled to her medical records under his constitutional right to confront his accusers under the Sixth Amendment to the United States Constitution and Article 2, Section 10 of the Arkansas Constitution. He claims that such records were necessary and relevant to the preparation of his defense.

The right of confrontation provides two types of protection for defendants in criminal cases: the right to face those who testify against them and the opportunity to conduct effective cross-examination. *See George v. State*, 306 Ark. 360, 813 S.W.2d 792 (1991); *Bowden v. State*, 301 Ark. 303, 783 S.W.2d 842 (1990).

Here, the trial court merely denied Gunter's objection to the introduction of medical testimony offered by the state in the testimony of Dr. Robert Kerr, which in no way implicates Gunter's Sixth Amendment right of confrontation. Dr. Kerr's name was on the witness list and, from the previous trial, Gunter was aware of the nature of Dr. Kerr's testimony. Gunter could have deposed the doctor before trial. He could have had a doctor examine Dr. Kerr's responses and testify at trial regarding the prosecutrix's medical condition. Gunter was also free to cross-examine the prosecutrix and Dr. Kerr at trial.

Additionally, while Gunter moved to compel discovery of the prosecutrix's medical and psychological records prior to the first trial, we find no indication that that motion was renewed prior to the second trial. During the second trial counsel for appellant referred to the motion in connection with his objection to a question to Dr. Kerr concerning the prosecutrix's physical strength and capacity to resist an assault. In the course of that objection, counsel renewed the motion to discover such records, but that came near the end of the state's case, and certainly it was not incumbent on the trial court to consider a pretrial discovery motion at that late stage in the proceedings.

Finally, appellant has made no showing as to how the prosecutrix's medical and psychological records would be relevant in determining whether she was forcibly raped.

III.

A third argument, the trial court erred in allowing the victim to testify as to the psychological effects of the crime without first affording Gunter with access to her psychological records, is similar to the previous argument.

Gunter contends that due to the prosecutrix's testimony regarding her psychological condition, he should have had access to her psychological records. He points to the testimony of the prosecutrix regarding the medical conditions prior to the rape which had caused her to leave her job and receive social security disability benefits. The state contends that because it was defense counsel who asked the prosecutrix about her job status and whether she was receiving social security benefits, any error was invited. An appellant cannot base a claim of reversible error upon testimony which he himself chose to introduce. *Kaestel v. State*, 274 Ark. 550, 626 S.W.2d 940 (1982).

The pertinent testimony was as follows:

> Q. How was your emotional situation following this attack?
>
> A. I was sent to Missouri. I've been seeing a psychiatrist.
>
> Q. I'm sorry I didn't mean it that broadly. I meant on the morning after this attack.
>
> A. On the morning after?

Q. Yes.

A. How was I feeling? Dr. Kerr gave me a shot to knock me out so it could calm me down. I've screamed and I've cried.

Q. It was emotionally upsetting to you?

A. Yes, sir. (Tr. 141-142)

The psychiatrist was not called as a witness nor even identified by name. There was no reference to diagnosis, treatment or number of visits. Moreover, defense counsel had the opportunity to cross-examine the prosecutrix further. In short, we are not persuaded that this passing reference to a psychiatrist, or a claim of being emotionally upset following an alleged rape and sexual assault, must, standing alone, subject the records of the asserted victim to the perusal of the alleged perpetrator. This fragment of testimony was limited in the extreme and provides no basis in our estimation for the opening of records that are particularly sensitive. Ark. R. Evid. 503.

Some six states have addressed the question whether a defendant in a rape case may be entitled to psychological records of the complaining party. Pennsylvania and Massachusetts have held that under the confrontation clause certain psychological records may be made available to the defendant under varying circumstances. *See Commonwealth v. Lloyd*, 567 A.2d 1357 (Pa. 1989), and *Commonwealth v. Stockhammer*, 507 N.E.2d 992 (Mass. 1991). Connecticut, Illinois, Minnesota and Missouri have rejected this type of access. *See Schmid v.*

State, 487 N.W.2d 539 (Minn. App. 1992).

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the United States Supreme Court addressed the circumstances under which a criminal defendant may gain access to confidential information. In that case, the defendant was charged with various sex offenses against his minor daughter and sought access to records at the Children and Youth Services. The United States Supreme Court reversed the lower court's decision that the failure to allow the defendant to search the files for relevant information violated the confrontation clause of the Sixth Amendment.

In some of the cases, the appellate court required an in-camera review of the records by the trial judge. However, in *State v. Hummel*, 483 N.W.2d 68 (Minn. 1992), the Minnesota Supreme Court held that in-camera examinations are not automatic, but that the defendant must make some showing as to the relevancy of the confidential material.

We conclude the trial court was correct in denying access to the prosecutrix's psychological records.

IV

Appellant argues that Officer Tommy Steen's testimony regarding the circumstances surrounding Gunter's arrest should have been suppressed, Officer Steen testified that when he and Officer Alman arrived at the home

of Kimberly Gunter, she allowed them to come in and search the house. Mrs. Gunter went with the officers as they searched each room. When they reached the bedroom, Mrs. Gunter stayed in the hall. Officer Steen went in and found Robert Gunter hiding in the closet.

Gunter argues that this testimony was more prejudicial than probative and should not have been admitted under Ark. R. Evid. 403. The trial court has discretion in determining the relevance of evidence and in weighing its probative value against unfair prejudice. *Simpson v. Hurt*, 294 Ark. 41, 740 S.W.2d 618 (1987).

Although the circumstances of the arrest were not vital in this case, the trial judge did not abuse his discretion in allowing such testimony. We have held that flight to avoid arrest may be considered by the jury as corroboration of evidence tending to establish guilt. *See Killcrease v. State*, 310 Ark. 392, 836 S.W.2d 380 (1993); *Ferguson v. State*, 298 Ark. 600, 769 S.W.2d 418 (1989); *Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983). In addition, even if the testimony about Gunter's arrest should not have been admitted, it was harmless error. An appellant must show prejudice because the appellate court will not reverse for harmless error. *Heinze v. State*, 309 Ark. 162, 827 S.W.2d 658 (1992). This testimony was not prejudicial and does not warrant reversal.

V

Robert Gunter objects to the prosecutrix's descrip-

tion of him in her trial testimony as "scroungy." On direct examination, the following occurred.

> Q. Now, did he look then as he does now?
>
> A. No.
>
> Q. How is he different?

At this point an objection was made by defense counsel and overruled.

> Q. Go ahead.
>
> A. He's cleaned up a lot: his hair is a lot shorter, he has a suit on, he was very scroungy looking. (Tr. 101)

Gunter argues that the above statements should have been excluded on the basis of Ark. R. Evid. 403 because they unfairly prejudiced and misled the jury. He claims that the only purpose of the testimony was to show that he was somehow an "unclean" or unkept person and he had cleaned himself up for court.

We are not persuaded that appellant's rights were substantially affected by this reference. Ark. R. Evid. 103. The victim merely used the word "scroungy" in attempting to contrast his appearance in court with the night of the incident. The trial court has discretion in determining the relevance of evidence and in gauging its probative value against unfair prejudice. *Simpson v. Hurt*, 294 Ark. 41, 740 S.W.2d 618 (1987). The trial court did not abuse

his discretion in allowing the testimony of the victim.

VI

During the testimony of Officer Steen, the following exchange occurred:

> Q. And in terms of this point Mr. Carter was trying to make about her supposedly indicating that he was proposing anal sex and she talked him into vaginal sex, did she portray that as a voluntary sex act?
>
> A. No.
>
> Q. Kind of like where do you want to be poked with a sharp stick, in which eye; isn't it?
>
> A. That's correct. (Tr. 308)

At this point, defense counsel objected and moved to strike the statement as being inflammatory and irrelevant. The objection was overruled.

The state submits that even if the comment was improper, it was not prejudicial and was harmless error. The remark could have had a tendency to inflame and an admonition may have been warranted. But none was requested. The failure to give an admonitory instruction is not prejudicial error in the absence of a request for such an instruction. *Vaughan v. State*, 289 Ark. 11, 709 S.W.2d 73 (1989). Because no curative relief was requested at

trial, no issue is preserved on appeal.

For the reasons stated, the judgment is affirmed.

JUDGMENT AND COMMITMENT ORDER

(Tr. 67)

IN THE CIRCUIT COURT OF BAXTER COUNTY, ARKANSAS, FOURTEENTH DISTRICT

On June 9, 1992, the defendant personally appeared before the court with legal counsel and, having been informed by the court of the nature of the charge(s), of his constitutional and legal rights, of the effect of a guilty plea upon those rights, and of his right to make a statement before sentencing, the court made the following findings: Defendant was found guilty at jury trial.

Defendant's Full Name: Robert D. Gunter Jr.
Race: W Sex: M
Defendant's Attorney: Christopher Carter (PD)
Prosecuting Attorney or Deputy: Gordon Webb
AT Number 21304

There being no legal cause shown by the defendant, as requested, why judgment should not be pronounced against him, a judgment of conviction is hereby entered against the defendant on each charge enumerated, and court costs assessed. The county sheriff is hereby ordered and directed to transport the defendant to the Arkansas Department of Correction, where he is sentenced to hard labor for the term specified on each charge:

Statute: 5-14-103
Offense: Rape
Offense Date: 6-7-91
Docket No.: 91-106
Counts: 1
F/M: F
Class: Y
Sentence: 40 years
Suspended: -0-

Time to serve at A.D.C.: Forty Years

Circuit Judge: ROBERT W. MCCORKINDALE II
Circuit Clerk: Rhonda Porter by K. LUTHER, D. C.

I acknowledge receipt of judgment: ROBERT GUNTER

Filed June 23, 1992.

COURT'S RULING ON RAPE SHIELD STATUTE

(Tr. 83-85)

Mr. Kincade: Unless there was something that came up in direct that would make it a rebuttal issue, but that would be hard for the court to rule on until it came up. But at this point, she's not under subpoena and I do not anticipate her being at the trial.

That leaves the state to a motion. Under the rape shield statute, Your Honor, we would like the defendant to be precluded from inquiring into the sexual past or his-

tory of the victim. Although we think there's probably nothing there that would be in the least embarrassing, just the very fact that the inquiry would be made could be embarrassing, and we would ask the court to grant that motion. We also would ask the court to grant a motion *in limine* that would prevent the defense from inquiring into potential allegations of rape that may or may not have been—not that any exist—but the very fact that the question was asked could have a misleading impact—could mislead the jury and tend to create a false impression of the existence of facts where none exist. So we would ask the court to (Tr. 83) grant a motion *in limine* that would prevent the defendant, or anyone on his behalf, from inquiring of the victim if she has ever made any allegations of rape against people in the past.

Mr. Carter: Your Honor, while Mr. Kincade's motion is probably proper, the court, by denying the motion I filed, the language is very specific that I cannot mention that or do anything along those lines or else it subjects both myself and the defendant to contempt of court; that the statute that I brought this motion under is a two-edged sword. If you deny it, then all of these things that Mr. Kincade wants are automatically excluded, and there are big penalties that you can impose on myself, as well as the defendant, should I get into those things. And that I'm aware of.

Mr. Kincade: We would like a specific motion granted to prevent the defendant from making gratuitous statements to that nature on the stand. At the point that

that occurred, the state would probably ask for a mistrial.

The Court: I'm going to grant that motion *in limine*, and I'll just expect Mr. Carter to instruct the defendant, in the event he takes the witness stand, that he'll not blurt out any such (Tr. 84) recriminations like that, or he will be looking at being held in contempt of court.

Mr. Carter: Your Honor, so the record's clear on this, I've received copies of the photographs which the state intends to introduce. There were some taken by Danette Grayham which I don't think the state is going to attempt to introduce because they didn't come out—

Mr. Kincade: No. But we are going to introduce Ms. Grayham's testimony. She was not listed on the list of witnesses, but I think I informed you about a month ago she would be one of our witnesses.

Mr. Carter: Your Honor, I've seen the subpoena for her. I have various statements from the various witnesses. Like I said, I have the statement of the defendant and of the victim. I picked their transcripts up this morning on those, and I have copies of some of the tests that have been run, and I realize the state has not seen and does not have a blood test and possibly a serology?

Mr. Kincade: I've not seen a serology test.

Mr. Carter: But I'm going to tell the court that the issue in this case is not whether or not sexual intercourse

occurred, because that's going to be conceded by the defense, and it will be conceded. (Tr. 85)

DEFENDANT'S OBJECTION TO COURT RULING ON CONFRONTATION CLAUSE CONCERNING MEDICAL RECORDS

(Tr. 247-250)

Q. And each of these was a visible evidence of injury she had sustained at some point, and, from your observation, it corresponded to what she was telling you about this sexual assault?

A. I felt it was consistent with that time frame, yes, sir.

Q. Did she describe for you the circumstances and the manner of her sexual assault?

Mr. Carter: Your Honor, at this point, I'm going to object as to that being irrelevant. Apparently, Mrs. Shaker was there for an examination or the discussion of her medical condition, and I don't think that has anything to do with her medical condition or the purpose of the doctor treating her.

The Court: The objection is premature. He can ask if she described it.

By Mr. Webb: Did she relate to you the circumstances under which she was sexually assaulted and the

manner in which she was assaulted?

A. I don't think we went into that. I think we more talked about how she felt, and then checked these physical things that were wrong. I don't believe—

Q. Did she continue to have emotional upset over it? (Tr. 247)

A. Yes, sir.

Q. Now, in terms of her being your patient on June 6th and 7th, was she physically—did she have conditions existing on those dates that would physically have rendered her in a position where it would have been difficult for her to resist a physical assault on her?

Mr. Carter: Your Honor, at this point I'm going to object. This doctor has testified that he did not examine her on that date. Any testimony that he would have with regard to her condition on that date would be from previous examination or connection with this person.

Mr. Webb: May we approach the bench? I suspect this is going to be a lengthy speech.

Thereupon, the following discussion was held at the bench and outside the hearing of the jury:

Mr. Carter: Your Honor, this is the same objection that I've made all along from my motion I filed on

September 30th; that we handled it in court the last time and the court allowed this testimony. I've renewed it again today, and they are going to introduce information with regard to her previous physical condition. I think I'm entitled to those medical records so I'll have a chance to examine them (Tr. 248) and be able to properly cross-examine them and determine whether or not—or have a doctor of my own review them, because that has not been done. I think all this information is irrelevant, under 403, and it certainly denies the defendant his Sixth Amendment right to confront his accusers and to have effective cross-examination.

The Court: I don't see that her medical condition has anything to do with the Sixth Amendment right to confrontation.

Mr. Webb: The testimony we're seeking to elicit is identical to what was introduced at the last trial. The doctor's in the position to say there are two physical conditions that exist that would render her weak in being able to resist a physical assault, and it's the same testimony that was introduced last time. I was unaware that Mr. Carter, having made that objection the last time, was continuing to seek these records.

The Court: The court had never heard anything further about it since the last trial, so the objection will be overruled.

Mr. Carter: Your Honor, then what I would pro-

pose to do is proffer pages 136 through 145 of the previous testimony, which is his testimony from then (Tr. 249) on, in terms of repeating the lengthy discussion that we had at the last trial concerning this matter; and I would proffer that, basically, for the purpose that I'm making the same objection, and I have—

The Court: You make your objection at each trial. If you're just saying that you want to offer your objection at the previous trial of this matter, I don't want to get into piggybacking objections. You make you objection at this trial. As far as I can tell, an objection has been made.

Mr. Carter: Your Honor, then, for the record, I would ask that the court note my continuing objection to any testimony on behalf of Dr. Kerr with regard to any previous medical condition.

The Court: Very well. You may proceed, Mr. Webb.

This concludes the discussion held at the bench and outside the hearing of the jury.

VICTIM'S TESTIMONY CONCERNING MENTAL HEALTH AND DEFENDANT'S OBJECTION
(Tr. 141)

A. Yes, sir more bruises appeared.

Q. Where were they located?

A. I had bruises on my arm, bruises here.

Q. You mentioned your lower front stomach area?

A. Yes, sir.

Q. Your pelvic region?

A. Yes, sir.

Q. What about on your back or your legs?

A. I had bruising on my back. There was some when I was at the hospital that night already, but I had more bruising in the next few days.

Q. All of these were injuries you received in this attack?

A. Yes, sir,

Q. In addition to the physical injuries, what was the status of your emotional health following this incident?

Mr. Carter: Your Honor, I'm going to object. I don't think this is relevant, and if it is, I've specifically requested certain records in order to cross-examine. I did file a motion on that. I think the court ruled on it once,

and I renew that motion.

The Court: The objection will be overruled.

VICTIM'S TESTIMONY CONCERNING SHORT MEMORY LOSS

(Tr. 152-153)

A. He never said, "I will kill you. I will hurt you."

Q. Ma'am, you've indicated you have a variety of medical problems; is that right?

A. That's correct.

Q. And you're on a number of medications; is that right?

A. That's correct.

Q. On June 6th and 7th of 1991, what medications were you on at that time?

A. My normal medications—are you talking about after the incident here?

Q. No. I'm talking about at that time. What was your regular medicine that you took?

A. I did not take any medication that day because Judy and I were going to be going out.

Q. Okay.

A. I was feeling better than I had felt in a while.

Q. Now, it's my understanding that you had a business close down a couple of months prior to June 6th; is that right?

A. Somewhere in that time period, yes.

Q. And you were meeting with Judy Smyser with an eye toward working for Wingard Studios; is that right?

A. That's correct.

Q. Did that ever develop?

A. No. I have not worked since this happened.

Q. At some time did you apply for social security disability? (Tr. 152)

A. I have.

Q. And what are the specific reasons that you've applied for social security disability?

A. Because of the medical problems that I have.

Q. Isn't it also true that you've applied because of a problem with short-term memory?

A. I do have some problems with short-term memory.

Q. Okay.

A. At different times.

Q. Now, how would that short-term memory affect what you might have told Officer Steen or Officer Robert Alman back in June of 1991?

A. I don't know. All I know is what happened that night. That is something that I will never forget. I wish I could, but you can't ever forget something like that.

Q. Well, then, how does this short-term memory affect you?

A. It has to do—I used to be a controller of our company in California. That's basically what it affects. It has more to do with numbers.

Q. Now, it's my understanding that you did not know, at that time, a man named Jack Kapelski?

A. No.

Q. But you know now that he was a man that was there with Mr. Gunter?

A. I heard that. (Tr. 153).

DEFENDANT'S MOTION FOR PSYCHOLOGICAL AND/OR MEDICAL RECORDS FILED SEPTEMBER 30, 1991

(Tr. 22-25)

Now comes the defendant, Robert D. Gunter Jr., by and through his attorney Christopher Carter and for his motion to compel discovery of the psychological and/or medical records pertaining to the complaining witness, a Mrs. Shaker, pursuant to Rule 17.4 of the Arkansas Rules of Criminal Procedure and states to the court:

1. That the defendant is charged with rape in alleged violation of Ark. Code Ann. §5-14-103, a Class Y felony.

2. That a trial in this matter is set for November 1991.

3. That the state, pursuant to Rule 17.1 and 17.2 of the Arkansas Rules of Criminal Procedure has failed to comply with discovery in this matter, even though pursuant to Rule 18 they have requested substantial discovery on the person of the defendant.

4. That the complaining party has been examined by a medical doctor and is under psychiatrist/psychologist or other social worker's care and said information is relevant and material to the preparation of a defense in this matter and the court pursuant to Rule 17.4 may be disclosed to defense counsel if it is material to the prepara-

tion of the defense.

5. That the information requested is material because the defense believes the state intends to introduce evidence that the complaining witness has been traumatized by the alleged event, that the state alleges (Tr. 22) that a rape had in fact occurred which is sexual battery on the physical person, and that statements made to any medical person or social worker, psychiatrist, psychologist are all relevant material to a preparation of a defense and that they are statements by the complaining witness or records concerning the mind or physical condition of the complaining witness and are therefore essential to the preparation of any defense in a rape case.

Wherefore, the defendant prays that the court enter an order compelling the complaining witness to sign over her psychological and medical records to defense counsel so that he may prepare a constitutionally valid defense. (Tr. 23)

Brief in Support of Motion

This motion is brought pursuant to Rule 17.4 of the Arkansas Rules of Criminal Procedure where the court in its discretion may require disclosure to defense counsel of other relevant material and information upon a showing of materiality to the preparation of defense. The material is necessary to the preparation as the defendant has already admitted in a taped statement to the police that sexual intercourse was engaged in, but it was

by mutual consent. Therefore medical records and psychological records of the complaining witness are essential matters which must be made available to defense counsel. (Tr. 24).

STATE'S DISCLOSURE TO DEFENDANT
(Tr. 26-28)

Comes now the state and pursuant to Rule 17, discloses to the defendant those item required pursuant to said rule.

The names and addresses of witnesses the state intends to call at any hearing or trial of this matter.

Response: Tommy Steen, Baxter County Sheriff's Office
Robert Alman, Norfork, Arkansas
Ken Grayham, Baxter County Sheriff's Office
Judy Smyser, Mountain Home, Arkansas
Emergency Room Personnel on Duty the Day of the Incident
Robert L. Kerr, Mountain Home, Arkansas
Jack Kapelski, Route 11, Box 547, Mtn. Hm., Arkansas
Matt Bennett
Verna Shaker, Mtn. Hm. Arkansas.
State Crime Lab Personnel, Little

Any written or recorded statements and the substance of any oral statements made by a defendant or co-defendant.

Response: Taped interview with defendant in possession of Tommy Steen.

Those portions of grand jury minutes containing testimony of (Tr. 26) the defendant.

Response: N/A

Any reports or statements of experts, made in connection with this particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons:

Response: Doctor and hospital medical treatment and records are in possession of the respective health care providers may be reviewed at defendant's expense on request of defendant's attorney. The State Crime Lab results will be made available to the defendant as it is made available to the prosecution.

Any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends

to use in any hearing or at trial or which were obtained from or belong to the defendant.

Response: Photos in possession of Tommy Steen may be seen and copied on request by defendant's attorney.

Any record of prior criminal convictions or persons whom the prosecuting attorney intends to call as a witnesses at any hearing or at trial, within the knowledge of the prosecuting attorney.

Response: None known to the state.

Relevant grand jury testimony.

Response: N/A

Electronic surveillance:

Response: N/A

The relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses. (Tr. 27)

Response: Prosecuting attorney does not know any witnesses other than police officers. (Tr. 28)

DEFENDANT'S MOTION FOR RULING ON ADMISSIBILITY OF EVIDENCE

(Tr. 44-48)

Now comes the defendant, Robert D. Gunter Jr., by and through his attorney Christopher Carter and for his notice of intent to use evidence of the alleged victims' prior sexual conduct states to the court:

1. That the defendant is charged with rape in alleged violation of Ark. Code Ann. §5-14-103 and this matter is set for a trial to a Baxter County jury on Monday, January 27, 1992.

2. That the court has refused funds to allow the defendant which to hire a private investigator.

3. That without an in-depth investigation, examination of medical records or psychological reports of the victim the defendant has nevertheless been able to establish through fairly reliable sources he believes that the alleged victim has previously made allegations of rape and if true are relevant to the trial of this cause and any such information or reports should be immediately turned over to the defendant and his attorney by the prosecuting attorney of the Fourteenth Judicial District.

4. That pursuant to Ark. Code Ann. §16-42-101 a written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence of

the victim's prior sexual conduct and the purpose for which the evidence is believed relevant. (Tr. 44)

5. That the defendant believes that the alleged victim has a history of allegations and desires to be the "center of attention" and such information is relevant to the defense of this case as sexual intercourse is not a dispute in this matter and the only defense raised by the defendant is one of consent. Pursuant to the defendant's requesting a hearing on the motion shall be held *in camera* no later than three days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.

Wherefore the defendant prays that the court allow him to question the alleged victim and bring matters concerning prior allegations of rape and her desires to be the center of attention. (Tr. 45)

Brief in Support of Motion

This motion is brought pursuant to Ark. Code Ann. §16-42-101 which states that:

> (c) Notwithstanding the prohibition contained in subsection (b) of this section, evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of the evidence is determined in the following manner:

(1) A written motion shall be filed by the defendant with the court at any time prior to the time defense rests stating that the defendant has an offer of relevant evidence of the victim's prior sexual conduct and the purpose for which the evidence is believed relevant.

(2) (A) A hearing on the motion shall be held in camera no later than three days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.

(B) A written record shall be made of the in camera hearing and shall be furnished to the Arkansas Supreme Court on appeal.

(C) If, following the hearing, the court determines that the offered proof is relevant to a fact in issue and that its probative (Tr. 47) value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence.

(3) (A) If the court determines that some or all of the offered proof is relevant to a fact in issue, the victim shall be told of the court's order and given the opportunity to consult in private with the prosecuting attor-

ney. (Tr. 48)

REMAINING PORTIONS OF DR. KERR'S TESTIMONY

(Tr. 242-246, 251-253)

Direct Examination

Q. Please state your name.

A. Robert L. Kerr.

Q. And where are you living, sir?

A. Mountain Home.

Q. And how do you make your living?

A. I'm a physician, family practice.

Q. How long have you been practicing medicine?

A. Since 1963.

Q. And are you licensed to practice medicine here in the state of Arkansas?

Mr. Carter: Your Honor, we can stipulate that Dr. Kerr is duly a licensed physician and is authorized to practice in the state of Arkansas, and maintains an office here in Baxter County; and with regard to his expertise, of

course, he is a licensed physician in this state. I would, however, renew my objection to any testimony solicited from Dr. Kerr that relates to anything other than follow-up (Tr. 242) checkups as to what has already been testified to.

The Court: Such an objection would be premature. You may raise it at the appropriate time. Mr. Webb?

Mr. Webb: From the stipulation then, Your Honor, proceeding with Dr. Kerr as an expert medical witness. Dr. Kerr, in your professional work, are you acquainted with Mrs. Verna Mae Shaker?

A. Yes, I am.

Q. How are you acquainted with her?

A. She's been my patient since August of '89.

Q. So you were her physician in June of '91 when she was sexually assaulted; is that correct?

A. That's correct.

Q. When did you first hear about the sexual assault?

A. She came to see me the morning of June 7th.

Q. So actually on the morning in which she was

assaulted, she came in to see you?

A. Yes, sir.

Q. Where were you?

A. I was at my office.

Q. And that was a Friday morning? (Tr. 243)

A. I don't remember the day of the week.

Q. And if I suggest to you it was a Friday morning, you wouldn't have any reason to disagree with that?

A. I sure wouldn't.

Q. When she came in, did she relate to you what had happened to her?

A. Yes, sir. She came in about 9:00 that morning and related what had happened that night, and that she'd been to the emergency room and was leaving there and came by to talk with me about it.

Q. Now, did you conduct a formal examination of her?

A. No, sir, I didn't.

Q. Why not?

A. She'd just been through all that at the emergency room, and we really just talked about the problem and about her being upset and gave her a little injection to help her calm down.

Q. What did you observe about her appearance or her situation at the time you saw her?

A. She was upset from what she'd been through and was distraught about it and we talked about that; and I thought she was upset enough that I gave her an injection of a sedative to help her calm down.

Q. So that it's fair to say, then, from your observation of her and your talking to her and hearing about what she'd been through, it was clear to you that she was emotionally upset? (Tr. 244)

A. Yes, sir.

Q. Now, was what you observed about her consistent with what she was telling you had happened to her?

A. I thought it was, yes.

Q. Now, did you subsequently have an occasion to conduct an examination, a physical examination, of her?

A. She came back on the 10th and we talked about her problems and by that time she had developed some bruising in some areas, and I checked for the bruises to

see where they were.

Q. So when she came to see you on the morning of the 7th, was she complaining about these physical injuries?

A. I don't think so. I think we mainly talked about the emotional aspect.

Q. Her problem right then was she was emotional?

A. Right.

Q. Traumatized, I guess?

A. Yes, sir.

Q. And when she came in on the 10th of June, the physical ailments had shown up?

A. Yes.

Q. And were visible on her?

A. Yes.

Q. What did you observe in relation to that?

A. She had a bruise on her left posterior—the back of her (Tr. 245) left leg; a small one on her left knee; two small bruises across the lower back; and one on the left

inner leg, the inside of her left leg.

Q. When you say "the left inner leg," you're talking about the inner thigh?

A. The inner thigh, yes, sir.

Q. Now, were any of these injuries serious in terms of risk of physical impairment or death?

A. I didn't think so, no, sir.

Q. What were they in the nature of?

A. They were more just a bruise which would be sore, give her some soreness, but no potential bad problems.

Q. Did they correspond in their appearance with the time frame of the sexual assault she was telling you about?

A. I thought so, yes, sir.

Q. Did she mention to you the cut on her upper left arm?

A. If she did, I didn't write that down. I don't have a record of that.

Q. Did she mention to you a bruise observed by

people at the emergency room on her right knee?

A. Yes, sir. I believe that—I've got "A small bruise on her right knee." It was her left thigh and her right knee. I think I said a while ago her left knee, but I think it was her right knee.

Q. And there was the back of the leg and then on the back? (Tr. 246)

* * * *

the existence of any conditions that would have rendered her on June 6th and 7th—that would have caused her difficulty in resisting a strong physical assault from someone else?

A. She has a couple of things wrong that I think would probably be significant: she has osteoporosis, and had had for about eight years, which it affected her spine; and she's actually had some compressed vertebrae, collapsed vertebrae in her back.

Q. How would that condition affect her ability to resist a strong physical assault?

A. Well, that's a weakening of the bones, and then that just naturally makes her unable to do as much physically as anyone else can.

Q. That was a condition that she'd suffered for

eight years?

A. I think my records show she started back in about '84.

Q. What was the other condition that she had?

A. She had mitral valve prolapse, which is a heart condition which shows that one of the valves is not working exactly right. She'd had a big workup for this out in California before she moved here, where they'd done angiograms and this type thing, and it showed that some of her arteries are small and made her heart not as strong as our hearts are.

Q. Again, how would that affect her ability to resist a strong physical assault?

A. I think it just makes her weaker than other people. (Tr. 251)

Q. Are both these conditions likely to affect her ability over a period of time to physically resist an assailant?

A. I would think so. Yes, sir.

Q. In other words, they would impact on her stamina?

A. Yes.

Q. Would it also impact upon her strength on any given moment, her relative strength?

A. I think she had decreased strength, yes.

Mr. Webb: Thank you. That's all the questions I have, Doctor.

Cross-Examination

Q. Doctor, isn't it true that in your 28 years or more of practice that you've never really had to deal with anybody that's come to you and said, "I've been the victim of a rape"?

A. That's correct.

Q. And it's my understanding that your physical examination of Verna Shaker occurred on the 10th, which is four days or so after the 7th; would you agree with me on that?

A. That's correct.

Q. At this point in time, did you make any notations as to what the bruises looked like?

A. No, sir, I didn't. I just noted that they were bruises.

Q. If there was a bruise approximately four days old, what would it look like? (Tr. 252)

A. Well, they're usually more bluish, more acute looking than an old brown fading bruise.

Q. At what point would a bruise be yellow?

A. Usually after several days.

Mr. Carter: I don't believe I have any further questions.

Redirect Examination

Mr. Webb: Doctor, in terms of the treatment you gave to Mrs. Shaker, was she on medication? Were you aware if she was on medication.

A. Yes, she was on medication.

Q. In terms of alcohol consumption, would these medications have an effect on her ability to tolerate alcohol?

A. I don't think—

Q. In other words, if she were to consume a quantity of alcohol, are the medications that you have prescribed, and she was taking for those conditions, medications that are going to affect how that alcohol affects here?

A. No, sir. (Tr. 253)